HEADWATERS, INC.

IBLA 88-427 Decided March 20, 1992

Appeal from a decision of the District Manager, Medford District, Oregon, Bureau of Land Management, denying protest of proposed timber sale. OR 110-TS7-54.

Affirmed.

1. Endangered Species Act of 1973: Generally--Timber Sales and Disposals

When all other challenges to a proposed timber sale have been resolved by Federal court action and the record, as supplemented on appeal, establishes that BLM fulfilled all of its responsibilities to conserve the Northern spotted owl (designated as threatened during the pendency of the appeal) imposed by the Endangered Species Act of 1973, as amended, 16 U.S.C. §§ 1531-1543 (1988), the Board will affirm BLM's decision to proceed with the sale.

APPEARANCES: Charles G. Levin, Esq., Grants Pass, Oregon, and William Sherlock, Esq., Ashland, Oregon, for appellant; Kevin Q. Davis, Esq., Portland, Oregon, for the Association of O&C Counties; David A. Jones, District Manager, Medford District, Oregon, Bureau of Land Management, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Headwaters, Inc. (Headwaters), has appealed from an April 19, 1988, decision of the District Manager, Medford District, Oregon, Bureau of Land Management (BLM), denying Headwaters' protest of the proposed Wilcox Peak B/O (Buy/Out) Timber Sale (No. 87-5).

On May 22, 1986, BLM prepared an environmental assessment (EA) to consider the environmental impact of the proposed timber sale and alternatives to the proposed sale. This EA was tiered to the November 1979 Jackson and Klamath Sustained Yield Units Ten-Year Timber Management Plan Environmental Impact Statement (EIS), as supplemented by the May 1985 Final Supplement to the Final EIS's for the Josephine and Jackson-Klamath Sustained Yield Units Ten-Year Timber Management Plans.

When the EA had been completed, the Area Manager, Jacksonville Resource Area, Oregon, BLM, issued a Decision Record/Finding of No Significant Impact on November 12, 1986, which was amended on June 12, 1987. In his decision, he elected to implement a "combination" of the proposed sale and one of the

alternatives. He also concluded that, based on the EA, the adopted timber sale would not significantly affect the quality of the human environment and, thus, an EIS was not required by section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (1988).

As finally approved, the timber sale would result in removal of 5,743 thousand board feet of timber from 252 acres of land by overstory removal (107 acres) and clearcutting (145 acres), rehabilitation of 4.09 miles of existing road, and construction of 2.83 miles of new road. 1/ The sale area consists of eight units, from 7 to 51 acres in secs. 18-20, 29, and 30, T. 35 S., R. 3 W., and sec. 13, T. 35 S., R. 4 W., Willamette Meridian, Jackson County, Oregon.

On July 17, 1987, Headwaters filed a protest objecting to the proposed sale and asserting various defects in BLM's decision. 2/ Headwaters contended that BLM had failed to comply with section 102(2)(C) of NEPA and its implementing regulations by not properly considering the environmental consequences of the sale and its alternatives, and by not preparing an EIS. Headwaters also asserted that BLM had violated the multiple-use mandates of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. §§ 1701-1784 (1988), and the watershed protection requirements of the Act of August 28, 1937 (O&C Act), as amended, 43 U.S.C. §§ 1181a, 1181b, 1181d-1181f (1988).

The timber sale took place on July 30, 1987. Croman Corporation (Croman) was the high bidder but no contract was immediately awarded because BLM's review of Headwaters' protest was pending. In his April 1988 decision, the District Manager addressed the contentions raised in Headwaters' protest, and denied the protest. He then stated that BLM would proceed with its implementation of the timber sale, pursuant to 43 CFR 5003.3(f).

On April 27, 1988, Headwaters filed a notice of appeal from the District Manager's April 1988 decision and requested a stay pending the Board decision on the merits. Headwaters then filed a statement of reasons (SOR) for its appeal, which, for the most part, incorporated the objections set out in its protest and notice of appeal. In general, Headwaters contended that BLM's decision to proceed violated section 102(2)(C) of NEPA and its implementing regulations because BLM failed to adequately consider the site-specific impacts of the sale (particularly the effect of reduction of old-growth forest on the Northern spotted owl (Strix occidentialis caurina)), cumulative impacts of the sale, and reasonable alternatives, and failed to prepare an EIS. Headwaters also reasserted its contention that BLM failed to comply with the multiple-use requirements of FLPMA and the watershed protection requirements of the O&C Act.

1/ The current sale replaced the Wilcox Peak timber sale (No. 80-8), which was approved by the Area Manager on June 1, 1979, but subsequently cancelled.

2/ The protest was filed by Headwaters, another organization, and various individuals. The individuals and other organization did not appeal from the District Manager's April 1988 decision.

By letter dated October 18, 1988, BLM notified Croman that its bid was conditionally accepted, subject to a special contract provision that it immediately cease construction and harvesting operations upon written notice from BLM that a "spotted owl has been located in the sale area" and resume discontinued operations only upon receipt of written instructions and authorization from BLM. The modified contract (No. OR 110-TS7-54) was subsequently executed by Croman and BLM.

Headwaters then filed a complaint with the U.S. District Court for the District of Oregon, seeking injunctive and declaratory relief. The complaint reiterated the arguments found in its administrative protest and appeal, and Headwaters asked the court to enjoin any construction or timber harvesting. A temporary restraining order was issued, and an amended opinion and order was issued on May 23, 1989. See Headwaters, Inc. v. BLM, No. 89-6016 (D. Or.). After concluding that Headwaters was not likely to succeed on the merits of its challenges the Judge denied Headwaters' motion for a preliminary injunction. Following a trial, the court issued an opinion and order on the merits on September 22, 1989, dismissing all of Headwaters' claims of error. An appeal was taken to the U.S. Court of Appeals for the Ninth Circuit, which affirmed the district court decision on September 10, 1990. Headwaters, Inc. v. BLM, 914 F.2d 1174 (9th Cir. 1990). Rehearing was denied (see Headwaters, Inc. v. BLM, 940 F.2d 435 (9th Cir. 1991)), and no certiorari was sought.

Noting that most of the issues raised by Headwaters in its appeal to the Board appeared to have been resolved by the district and circuit courts, we issued an order on November 29, 1991, designed to resolve a matter which had been noted but not resolved by the courts. See, e.g., Headwaters, Inc. v. BLM, 940 F.2d at 435-36. That matter concerns BLM's compliance with the Endangered Species Act of 1973 (the ESA), as amended, 16 U.S.C. §§ 1531-1543 (1988). Specifically, we noted that in May 1988 a nest containing a pair of adult Northern spotted owls and juveniles had been spotted within the contract area, approximately 100 feet from the border of sale unit 30-7A, and that the Northern spotted owl had been declared a threatened species by the Fish and Wildlife Service (FWS), U.S. Department of the Interior, pursuant to the ESA, on July 23, 1990 (see 55 FR 26114 (June 26, 1990)). We also noted that BLM had initiated formal consultation with FWS pursuant to section 7(a)(2) of the ESA, as amended, 16 U.S.C. § 1536(a)(2) (1988), 3/

3/ Section 7(a)(2) of the ESA requires Federal agencies to, in consultation with FWS, "insure that any action authorized * * * by [that] agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species" (16 U.S.C. § 1536(a)(2) (1988)). See also 50 CFR Part 402; Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson, 685 F.2d 678, 687 (D.C. Cir. 1982). Section 7(a)(2) of the ESA imposes both the procedural obligation to consult with FWS and a substantive obligation. See Pyramid Lake Paiute Tribe of Indians v. U.S. Department of Navy, 898 F.2d 1410, 1415 (9th Cir. 1990).

and suspended operations under the sale contract. To determine what action BLM had taken, the results of that action, and the impact of the owl sighting and the listing of the owl as a threatened species on the pending appeal, we instructed BLM to supplement the record on those points. We also afforded Headwaters and the Association of O&C Counties (which had been admitted as an amicus curiae) an opportunity to respond.

On December 30, 1991, the District Manager responded with detailed supplemental information and stating his belief that BLM had "fulfilled its responsibilities under the ESA" (Letter to Board, dated Dec. 24, 1991, at 4). BLM had sought section 7(a)(2) consultation with FWS on July 11, 1990, and had submitted a biological assessment (BA), stating that, although the pair had failed to nest at the site 100 feet from sale unit 30-7A during the 1989 and 1990 nesting seasons, the sale would have a "high impact" on that site because its activity center still overlapped the sale unit (BA at 3). BLM also noted that the sale would remove 252 acres of suitable owl habitat in Federal ownership surrounding the Wilcox Peak site (leaving 1,477 acres). See also Interim Conferencing Report for the Wilcox Peak Timber Sale FY87 (ICR), dated June 17, 1990, at 1. BLM also concluded that the sale would have a "low impact" on two other owl sites (Murphy Gulch and Middle Sardine) situated over 1-1/2 miles from any sale unit (BA at 3). In his December 1991 letter the District Manager stated that, effective July 23, 1990, BLM had suspended operations under the sale contract pending the completion of consultation.

FWS issued a biological opinion (BO) on October 5, 1990, concluding that, although the sale would adversely affect the spotted owl by causing the loss and fragmentation of suitable owl habitat (resulting in the incidental taking 4/ of the owl pair at the Wilcox Peak site), it was not likely to jeopardize the continued existence of the species. 5/ See BO at 1-2. FWS based its no-jeopardy determination largely on the fact that the sale would affect less than 0.1 percent of suitable owl habitat on BLM lands in Oregon. See id. at 1-25.

The incidental taking of the Wilcox Peak pair would be prohibited by sections 4(d) and 9(a)(1) of the ESA, as amended, 16 U.S.C. §§ 1533(d) and 1538(a)(1) (1988), and 50 CFR 17.21(c) and 17.31(a) if FWS' opinion had not contained an "incidental take statement" (BO at 1-21). This statement

4/ A taking, incidental or otherwise, includes any action which "harass[es] [or] harm[s]" a threatened species (16 U.S.C. § 1532(19) (1988)). An incidental taking is that which "result[s] from, but [is] not the purpose of, carrying out an otherwise lawful activity" (50 CFR 402.02).

5/ The District Manager reports that during the 1991 breeding season the Wilcox Peak pair nested within sale unit 30-7A and successfully fledged one young, despite attempts by BLM biologists to encourage nesting outside the unit by placing nesting boxes and platforms elsewhere. FWS concluded that the sale was likely to result in the incidental taking of that pair when the pair was nesting adjacent to unit 30-7A. Therefore, this event would not alter FWS' previously stated opinion.

was predicated on a determination, in accordance with 16 U.S.C. § 1536(b)(4) (1988), and 50 CFR 402.14(i)(1), that neither the sale nor the taking of the owl pair was likely to jeopardize the continued existence of the species. See Defenders of Wildlife v. Administrator, EPA, 882 F.2d 1294, 1300 (8th Cir. 1989). The statement set forth the terms and conditions for implementing reasonable and prudent measures designed to minimize the impact of the taking on the species, in conformance with 16 U.S.C. § 1536(b)(4) (1988), and 50 CFR 402.14(i)(1). Specifically, FWS sought to prevent any disturbance of the spotted owl pair and its progeny by requiring BLM implementation of a seasonal restriction (March 1 through September 30) on felling of trees within 0.5 miles of a nesting site or pair activity center if nesting or fledging activities were occurring during the year of harvesting. See BO at 1-23. In these circumstances, the incidental taking would not be statutorily prohibited if it occurred in accordance with the stated terms and conditions. See 16 U.S.C. § 1536(o)(2) (1988); 50 CFR 402.14(i)(5); Defenders of Wildlife v. Administrator, EPA, supra at 1300.

In his December 1991 letter, the District Manager noted that Croman agreed to a sale contract modification incorporating the FWS mandated restriction precluding felling operations within certain units, including 30-7A, during the breeding season. The amendment to the contract was signed and the suspension of operations was lifted on November 7, 1990, and road renovation commenced in August 1991. The construction of roads, including the felling of trees in the planned rights-of-way, was undertaken from September through November 1991. There is no evidence that this activity did not conform with the seasonal restriction. 6/ Timber harvesting has not yet occurred.

The Interagency Scientific Committee (ISC) has designated the Wilcox Peak owl site as a category 4 habitat conservation area (HCA). In a program recommended by ISC and adopted by the Director, BLM, known as the "Jamison Strategy," 7/ BLM was instructed not to offer for sale the timber on land within HCA categories 1 through 4 because HCA's were considered crucial to the recommended long-term strategy for preserving the spotted owl. See BO at 1-10. Thus, HCA categories 1 through 4 were to be off-limits to timber harvesting and associated activity. Although the HCA involved here encompasses all or a portion of the sale area, FWS noted that, when proposing its long-term conservation strategy, ISC assumed completion of the timber harvest in sale areas offered prior to enactment of section 318 of the Act of October 23, 1989, 103 Stat. 746 (termed pre-section 318 sales). See BO at 1-16. Thus, according to FWS, implementation of pre-section 318 sales "should not impact the options for long-term conservation according to the ISC's plan by reducing habitat within HCA's." Id.

6/ According to BLM, the cutting in the rights-of -way was conducted in accordance with the seasonal restriction contained in the modified sale contract.

7/ The Jamison strategy is a management plan entitled "Northern Spotted Owl: The Jamison Plan Detailed Management Strategy" supplemented by a BLM report entitled "Management Guidelines for the Conservation of the Northern Spotted Owl FY 1991 through FY 1992" (Management Guidelines).

This sale, which was offered in 1987, is clearly a pre-section 318 sale. There is also no suggestion that, when he adopted the ISC recommendation for the HCA areas in 1990, the BLM Director intended to prohibit pre-section 318 sales. The Management Guidelines provided, at page 5, that: "No regular green timber sales will be offered * * * in the HCA Category * * * 4 areas." (Emphasis added.) Thus, we conclude that this sale is not precluded under the Jamison Strategy by reason of the fact that all or a portion of the sale area is a category 4 HCA. When FWS prepared its opinion no critical Northern spotted owl habitat had been proposed or designated. See BO at 1-2. However, in his December 1991 letter, the District Manager noted that no portion of the sale area, including the Wilcox Peak owl site, was proposed as critical habitat by FWS. See 56 FR 40002 (Aug. 13, 1991).

Headwaters filed a response to BLM's December 1991 filing on January 21, 1992. In its response, Headwaters recites the facts set out in the District Manager's December 1991 letter, admits that BLM has complied with the ESA consultation requirements, but contends that BLM has failed to "seek to conserve" the spotted owl as required by section 2(c)(1) of the ESA, as amended, 16 U.S.C. § 1531(c)(1) (1988), because BLM did not preclude logging in unit 30-7A, and logging that unit will result in a taking of the Wilcox Peak pair. 8/

[1] Headwaters confuses BLM's duty to "seek to conserve * * * [a] threatened species" (16 U.S.C. § 1531(c)(1) (1988)), which is part of Congress' declared policy under section 2(c)(1) of the ESA, with the responsibilities imposed upon BLM when there is an anticipated incidental taking. As FWS stated at page 1-18 of its BO: "Standards upon which take is based should not be confused with what is needed to manage and conserve the species in the wild."

Section 2(c)(1) of the ESA imposes the requirement to seek to conserve the spotted owl as a species. BLM is required to use "all methods * * * which are necessary to bring [the] * * * threatened species to the point at which the measures provided pursuant to th[e] [ESA] are no longer necessary." 16 U.S.C. § 1532(3) (1988). See Sierra Club v. Clark, 577 F. Supp. 783, 789 (D. Minn. 1984), aff'd in part, rev'd in part, 755 F.2d 608 (8th Cir. 1985). There is no evidence that BLM has failed in that duty. It sought consultation with FWS and FWS concluded that the sale is not likely to jeopardize the continued existence of the spotted owl as a species, and it is not established that unit 30-7A is necessary to return the species from its threatened status. See Pyramid Lake Paiute Tribe of Indians v. U.S. Department of Navy, supra at 1416-19. BLM's decision to allow an incidental taking of the particular spotted owl pair is not necessarily inconsistent with its duty to conserve the species, particularly when this incidental taking is not prohibited by the ESA.

8/ Headwaters does not contend that the sale is likely to jeopardize the continued existence of the Northern spotted owl per se or result in the destruction or adverse modification of the owl's critical habitat, thus violating the proscription of section 7(a)(2) of the ESA.

The court's decision in Defenders of Wildlife v. Andrus, 428 F. Supp. 167 (D.D.C. 1977), is illustrative of this point. In that case, the court found the Department of the Interior to be obligated under the ESA to "avoid the elimination of protected species" and to "bring these species back from the brink so that they may be removed from the protected class." Id. at 170 (citing 16 U.S.C. § 1532(3) (1988)). The court concluded that FWS had failed in this latter obligation because it promulgated regulations permitting sport hunting of migratory game birds during twilight hours, which might result in the killing of "considerable" numbers of protected birds, thus affecting the species. Id. When instructing FWS to reconsider the rulemaking the court stated: "This is not to say that twilight shooting must be prohibited if protected species are subject to any killing by inadvertent action of hunters or otherwise. [Rather,] * * * hunting hours * * * [must be] so fixed that such killing is kept to the minimum." Id. (emphasis added). Defenders clearly illustrates that requiring a Federal agency to conserve a species does not impose a duty to avoid any incidental taking of individual members of that species.

The ESA does not preclude BLM's permitting action which would result in the incidental taking of an individual member (or members) of a threatened species. Nor does it require BLM to modify a permitted action to avoid the possibility of an incidental taking. If BLM consults with FWS and FWS determines that the incidental taking and underlying action are not likely to jeopardize the continued existence of the species, and the taking conforms to a written FWS plan for minimizing the impact of the action on the species, BLM may permit the action. See American Littoral Society v. Herndon, 720 F. Supp. 942, 944, 948-49 (S.D. Fla. 1988). This is what has occurred. The no-jeopardy determination and plan are contained in the FWS opinion and there is no evidence that the taking will not comply with the plan.

We have no doubt that Headwaters would like to have BLM do more than merely suspend the felling of trees during the breeding season. It seeks to prevent all logging in unit 30-7A. FWS recognized that it was precluded from mandating this action by 50 CFR 402.14(i)(2), which provides that FWS cannot alter the "basic design [or] scope" of the permitted action when setting forth its written plan. Thus, FWS could not require BLM to eliminate timber sale units, though BLM was not prevented from independently choosing that course of action. It chose not to. The mere fact that Headwaters would prefer having BLM independently adopt this measure does not establish error in its failure to so act. See G. Jon Roush, 112 IBLA 293, 298 (1990). 9/

9/ Headwaters also suggests that, when BLM modified the timber sale contract to incorporate the seasonal restriction, BLM failed to act consistent with the Oregon State Director's Instruction Memorandum (IM) that BLM require modification of the contract to incorporate the seasonal logging restriction "and other modifications as necessary" (IM No. OR-91-17 at 1 (Oct. 10, 1990)). No other specific modification was required by this IM, and FWS required no other modification designed to minimize the impact of the taking. There is no evidence that elimination of unit 30-7A is

Headwaters also argues that BLM should abide by the rule issued by the Oregon Department of Forestry, effective June 6, 1991 (Or. Admin. R. 629-24-810). This rule, issued following the listing of the spotted owl as a threatened species, would require Croman to prepare a written plan addressing how its operations would maintain 70 acres of suitable owl habitat surrounding a nesting site. Headwaters refers to the fact that the sale will result in the clearcutting of 41 acres in unit 30-7A, which currently contains the Wilcox Peak spotted owl pair's nesting site. Headwaters is well aware of the fact that Congress has preempted State regulation, and thus Or. Admin. R. 629-24-810 is not applicable to management of the Federal lands for the conservation of threatened species. See Headwater's Jan. 10, 1992, letter to this Board at 3; see generally 73A C.J.S. Public Lands § 4 (1983) at 447-48. BLM is not required to provide a 70-acre buffer of undisturbed habitat around the current Wilcox Peak nesting site.

FWS concluded that the sale would result in the incidental taking of the Wilcox Peak pair because the logging would reduce suitable owl habitat within 0.5 miles of the nesting site or pair activity center and would further reduce suitable owl habitat below 40 percent of the acreage within 2.1 miles of the nesting site or pair activity center (the "home range"). FWS also indicated that it would generally consider whether timber harvesting would "result in less than 70 acres of the best available spotted owl nesting habitat encompassing nest sites and/or pair activity centers" (BO at 1-21). FWS concluded that an incidental taking would occur without having considered this factor because BLM did not provide the information necessary to do so (see BO at 1-18). We recognize that an owl pair moved into unit 30-7A after FWS rendered its opinion. 10/ This fact may serve to underline the "incidental taking" aspect of BLM's decision, but it does not substantively alter the effects implicit in FWS' original analysis. This change in conditions could serve as the basis for BLM's seeking a contract modification eliminating the unit (or part of it) from the sale. However, based on our foregoing analysis of the applicable law, we find no justification for holding that BLM is required to do so. 11/

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fn. 9 (continued)
"necessary." The mere fact that Headwaters considers it necessary does not make it necessary.

10/ The shift in the location of the nesting site does not dictate a change in the contract's seasonal restriction to make other units subject to the restriction. The shift has not caused any other unit to fall within 0.5 miles of the nesting site. See Timber Sale Contract Map (Exh. A, Page 2 of 2) attached to ICR.

11/ The timber sales contract was awarded to Croman, and the activity contemplated by that contract was commenced while the Headwaters appeal was pending. In these circumstances, BLM and Croman have implemented the timber sales contract at their mutual risk. The contingency that the contract may be modified or cancelled during the course of the Headwaters litigation should have been and should remain clearly within their contemplation. We also note that, during the course of the Headwaters litigation, BLM has retained authority to either modify or cancel the timber sales contract to the extent deemed necessary but, to date, has not chosen to do so.

In our November 1991 order, we stated, at page 4, that "[i]t now appears that all of the other issues raised by Headwaters on appeal to the Board [with the exception of the question of whether BLM has now complied with the ESA] have been addressed by the district and circuit courts in Headwaters [,Inc.] v. BLM." In its response to BLM's recent submission Headwaters states only that the ESA issue "remains unresolved" and that, with the exception of sale unit 30-7A, it "does not advocate dropping or suspending the entire Wilcox Peak Timber Sale" (Letter to Board, dated Jan. 10, 1992, at 1, 3). It does not contend that any of these other issues were not resolved by the courts. We therefore conclude that the district and circuit court decisions in Headwaters, Inc. v. BLM fully and adequately resolved all of the issues originally raised by Headwaters in its SOR. See Amended Opinion and Order, Headwaters, Inc. v. BLM, No. 89-6016 (D. Or. May 23, 1989), at 18 (cumulative impacts), 21-22 (site-specific analysis), 22-23 (alternatives), 23-25 (multiple use), 26 (O&C); Headwaters, Inc. v. BLM, 914 F.2d at 1177-78 (EIS), 1180-81 (alternatives), 1181-82 (cumulative impacts), 1182-83 (multiple use), 1183-84 (O&C). We find no BLM failure to comply with either section 102(2)(C) of NEPA, FLPMA, or the O&C Act, and affirm the District Manager's April 1988 decision in this respect. See also Opinion, Headwaters, Inc. v. BLM, No. 87-1275-PA (D. Or. May 3, 1988), at 6-8; Headwaters, Inc., 116 IBLA 129, 135 (1990).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

R. W. Mullen
Administrative Judge

I concur:

James L. Burski
Administrative Judge